IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 73-628

ALLENBERG COTTON COMPANY, INC.,
Appellant,

vs.

BEN E. PITTMAN,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

REPLY BRIEF OF APPELLANT

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INDEX

TABLE OF CITATIONS

Cases:

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I.

JURISDICTION

The only new point raised in the Appellee's Brief with regard to jurisdiction is the contention that Allenberg has "waived" its right to have this case considered because it has taken the position that the certificate issued by the Supreme Court

of Mississippi does not need to be physically signed by *all five* members of that Court. See Appellee's Brief, Page 48.

This is certainly a novel contention.

The previous Order of this Court was designed to allow Allenberg to obtain *another* certificate stating whether the judgment below rested on an "adequate and independent state ground." Allenberg declined to do this because it believed the original certificate was sufficient, and because it believed that no "adequate and independent state ground" could logically exist.

If it is the desire of this Court that all five members of the Mississippi Supreme Court sign the certificate, Allenberg will apply to that Court for the remaining four signatures. However, Allenberg respectfully suggests that such a procedure would be an undue affront to the integrity of Chief Justice Robert G. Gillespie and the Clerk of the Mississippi Supreme Court, both of whom have certified that the certificate was issued by the Mississippi Supreme Court.

II.

THE MOTION TO STRIKE

Counsel for Appellee have moved to strike all or certain portions of the Brief filed by Amicus. Although this motion is not addressed to Appellant's Brief, Appellant wishes to respond because of its strong feeling that nothing in Amicus' Brief is in any way improper.

The Amicus Brief was principally authored by James F. Blumstein, Associate Professor of Law at Vanderbilt University Law School, now a visiting Professor of Law at the Duke University Law School. Mr. Blumstein worked

under the guidance of Mr. Neal P. Gillen, General Counsel for the American Cotton Shippers Association. The Amicus Brief contains a serious and intelligent discussion of the principles of law under consideration in this case, *and of their underlying policies*.

This case concerns the enforcement of contractual promises which the Appellee does not deny having made. These promises were made within a commercial and constitutional system which has been established to preserve certain principles. The portions of the Amicus Brief to which Appellee objects deal directly with the heart of this dispute, and address, in concrete form, the question of the soundness of Appellee's position when viewed in the light of the ethical policies and principles which underlie the enforcement of contracts by society.

As Dean Pound has stated:

> "Wealth, in a commercial age, is made up largely of promises. An important part of everyone's substance consists of advantages which others have promised to provide for or to render to him; of demands to have the advantages promised which he may assert not against the world at large but against particular individuals. Thus the individual claims to have performance of advantageous promises secured to him. He claims the satisfaction of expectations created by promises and agreements. If this claim is not secured friction and waste obviously result, and unless some countervailing interest must come into account which would be sacrificed in the process, it would seem that the individual interest in promised advantages should be secured to the full extent of what has been assured to him by the deliberate promise of another. Let us put this in another way. In a former lecture I sug-

gested, as a jural postulate of civilized society, that in such a society men must be able to assume that those with whom they deal in the general intercourse of the society will act in good faith, and as a corollary must be able to assume that those with whom they so deal will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto. Hence, in a commercial and industrial society, a claim or want or demand of society that promises be kept and that undertakings be carried out in good faith, a social interest in the stability of promises as a social and economic institution, becomes of the first importance. This social interest in the security of transactions, as one might call it, requires that we secure the individual interest of the promisee, that is, his claim or demand to be assured in the expectation created, which has become part of his substance." [Pound, An Introduction to the Philosophy of Law, Yale University Press (1954) Pp. 133-34.]

Appellee has sought to justify his posture in this case by identifying his position with the interest of the State, i.e. with the larger interest of the government and society. Appellee has asserted that his action serves a desirable end as the action of a "private attorney general." But the Amicus Brief has challenged that posture, and has sought to point out that Appellee's legal position is in fundamental conflict with the basic interest of the State in recognizing that promises create value and that their enforcement is a necessity for maintaining value as a basis of civilization in a commercial age.

These ethical considerations are present in this case, not just in the abstract, but in a concrete and real manner. The validation of Pittman's repudiation of his contract by the Mississippi court in May, 1973, caused a shock wave

throughout the cotton industry. Counsel for the American Cotton Shippers Association, together with the cotton merchants, went through an agonizing and traumatic period between the decision in this case and the decision in *Cone Mills Corp. vs. Hurdle*, 369 F. Supp. 426 (N.D. Miss. 1974), on January 10, 1974. In Mississippi alone, where outright repudiation of forward contracts became most widespread, there were over one million bales of cotton (about one out of every twelve bales produced in the nation in 1973) under forward contract in 1973. Repudiations of these contracts were not the actions of "private attorneys general," but self-seeking actions of men undermining the very foundation of commercial intercourse in the federal free trade system which the Commerce Clause was intended to establish.

The Amicus Brief seeks to direct the Court's attention to these basic considerations. Surely there is nothing improper in doing so. Indeed, it would be improper to fail to point up the fundamental contradiction between the needs of society and the Appellee's position in this case.

For these reasons the Motion to Strike should be denied.

III.

CORRECTION OF CERTAIN OF APPELLEE'S INFERENCES ABOUT THE FACTS

Pittman argues that Allenberg has substantial contacts in the State of Mississippi which go beyond those necessary to conduct the business of buying and selling cotton in interstate commerce.

Specifically, what are Allenberg's contacts in the State of Mississippi?

Allenberg does not have an office in Mississippi, nor does it own a warehouse there. Allenberg has no employees working in Mississippi to solicit business. It has no employees in Mississippi at all. It has no bank accounts in Mississippi. It makes no sales of cotton in Mississippi. Contrary to the implications of Appellee's Brief at page 2, Allenberg does not pay for the cotton in Mississippi. Allenberg pays for the cotton at its bank in Memphis, Tennessee, the Union Planters National Bank of Memphis, when a draft is presented to that bank in Memphis with negotiable warehouse receipts attached. Such a draft could be presented to the bank by the farmer himself. However, in the instant case the local cotton broker (an independent broker acting for both parties)[1] explained that if Pittman had delivered, he (the broker) would have paid for the cotton himself, and then have prepared the draft on Allenberg's bank. Thereafter, the draft would have been presented through banking channels to Allenberg's bank in Memphis for payment. Allenberg does not loan the money to the broker for this purpose. No advance is made by Allenberg to the broker. Allenberg's payments are made in exchange for the delivery of the negotiable documents in Tennessee. Appendix, page A-60, A-68.

After the warehouse receipts are received in Memphis and paid for in Memphis, Allenberg becomes the owner of a negotiable document representing cotton in a Mississippi compress and warehouse for a period of time long enough to allow Allenberg to sort Pittman's cotton into

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1 The local cotton broker is an independent businessman living in Marks, Mississippi. He is not an employee of Allenberg's, or of Pittman's. He is paid a per bale commission for arranging the sale between the two parties. Sometimes the commission is paid by the farmer selling his cotton, sometimes by the buyer. Appendix, p. 53.

shipping lots (in the trade called "even-running lots" usually of 100 bales each) and issue shipping orders to the compress and warehouse instructing it to load particular bales from Pittman's crop and from other crops in groups of like grade and quality onto freight cars for shipment out of the State of Mississippi. Sorting and classification of cotton, and issuance of shipping orders, is done in Memphis (again contrary to the implications of Appellee's Brief at p. 10).

The compress warehouse performs three essential functions: (1) it issues negotiable warehouse receipts[2] pursuant to the United States Warehouse Act, 7 USC Sec. 241, et seq.; (2) it compresses the cotton into shipping bales; (3) it performs the mechanical function of loading the bales on freight cars in even-running lots for shipment out of Mississippi pursuant to the shipping instructions of the buyer.

It is not normally possible for cotton to be shipped from Mississippi until the loose gin flat bales have been compressed into shipping bales, and sorted. Except in rare cases, cotton from a particular farm is not all of the same grade and quality and cannot be shipped together to a particular mill. The buyer in Memphis must sort it by sample and group it with other cotton into even-running lots to meet the particular specifications of a given mill before it can instruct the warehouse to perform the mechanical function of removing the designated bale from the warehouse and placing it on a freight car. It is not economi-

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2 The cotton is purchased by the cotton merchant with up to 90% borrowed capital which is furnished by the merchant's bank using the negotiable warehouse receipt as collateral for the loan. See materials at **Statement of the Case** p. 19. Thus the warehouse is also necessary to interstate commerce in cotton because its negotiable receipt forms the security for the loan of funds which makes the purchase possible.

cally feasible to ship a given cotton bale from the area where it was produced until it has been classified by the buyer to determine which mill's needs it may fill and where it is to be shipped. See materials of STATEMENT OF CASE, pages 9-12.

Thus Allenberg did nothing in Mississippi which was not absolutely essential to purchasing cotton for shipment in interstate commerce.[3] If its activities in Mississippi require qualification to do business there, the business of

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[3] The minimum presence of Allenberg in the State of Mississippi immediately distinguishes the instant case from many of the decisions cited by Pittman.

In **Union Brokerage Co. vs. Jensen**, 322 U.S. 202 (1944), the company was required to qualify where the Court found that it had established a local office and local operations just like any local business. The company established a local operation "wholly outside of the arrangements it makes with importers or exporters." [322 U.S. 208] Union Brokerage Co. was required to qualify for that portion of its operations that were intrastate, and the Court made it clear that where a foreign corporation comes into the state to conclude an interstate transaction it would be free of the qualification requirement. The Court expressly cited with approval, **Dahnke-Walker, Sioux Remedy**, and **International Textbook.** [322 U.S. 211]

In **Federal Compress & Warehouse Company vs. McLean**, 291 U.S. 17(1934) the Court upheld a state license tax on **local** compress and warehouse companies graduated by the number of bales of cotton compressed per annum. The Court stated "...the burden of the tax upon the commerce is too indirect and remote to transgress constitutional limitations. [Citations omitted.] The case, therefore, stands on a different footing from those in which local regulation of the business of purchasing a commodity within and shipping it without the state have been deemed to impede or embarrass interstate commerce in those commodities. [Citing **Dahnke-Walker** and **Lemke**]." [291 U.S. at 22]. Contrary to the statement in Appellee's Brief at p. 3, Allenberg does not engage in the cotton warehousing business in Mississippi and there is nothing in the record even remotely hinting that it does.

For identical reasons **Independent Warehouses, Inc. vs. Scheele**, 331 U.S. 70 (1947), cited by Appellee's Brief at p. 13, is also inapplicable to this case. There a town in New Jersey was allowed to tax the local "business of storing goods for hire." [331 U.S. at 72].

(Continued on following page)

buying cotton cannot be carried on without local qualification in each state where cotton is purchased.[4] This result would, of course, be completely inconsistent with the principle that no state can require local qualification to allow access to local markets. That principle was recently reaffirmed by *every* member of the Supreme Court in *Eli Lilly and Co. vs. Sav-on-Drugs, Inc.*, 366 U.S. 278 (1961).

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The case of **Sunlight Produce Co. vs. State**, 183 Ark. 64, 35 S.W. 2d 342, relied upon by Appellee's Brief at p. 19, held that the business conducted was "partly" intrastate where the foreign corporation: had a salaried local manager-buyer; had a local office in a house in Arkansas rented for that purpose; paid for purchases of milk locally; and stored the goods purchased in the local house. In contrast, Allenberg had no local salaried manager-buyer, no local office, did not pay for the goods locally, and did not store them on its own local premises.

In the case of **In re Conecuh Pine Lumber & Mfg. Co.**, 180 F. 249 (M.D. Ala. 1910) an Alabama federal district court decision does appear to support Pittman's position. However, both the language and holding of that case are almost identical to the language and holding of the Kentucky Supreme Court opinion which was reversed in **Dahnke-Walker Milling Co. vs. Bondurant**, 257 U.S. 882 (1921). **Conecuh Pine Lumber** also conflicts with **Shafer vs. Farmers' Grain Co.**, 268 U.S. 189 (1925). **Dahnke-Walker**, of course, was decided eleven years after **Conecuh Pine Lumber**, and **Shafer** was decided fifteen years afterwards.

More recent decisions of the federal district courts in Alabama have held that purchasing cotton in Alabama through forward contracts is not an activity which requires qualification to do business in Alabama. See, for example, **Reigal Fiber Corp. vs. Ellis Brothers**, N.D. Ala. No. 73P-954 (1974). Federal district courts in Georgia have also held that cotton purchases like Allenberg's in this case do not constitute doing intrastate business. **R. N. Kelly Cotton Merchant, Inc. vs. York**, M.D. Ga., No. CA-861 (1974).

4 This case gives rise to a question similar to that posed by Mr. Justice Bradley in **Robbins vs. Shelby County Taxing District**, 120 U.S. 489, 494 (1887). If Allenberg's purchases require local qualification, how is an out of state company to gain access to buy cotton in a market in another state — access supposedly guaranteed by the Commerce Clause without local qualification? If cotton buyers cannot conduct their purchases in the manner followed by Allenberg, they will be shut out from these markets unless they qualify in each state where purchases are made. See footnote 17, infra.

(Continued on following page)

A company which has done nothing in a State which is not essential to buying a commodity there and shipping it from the state is engaged in interstate commerce, and it should not be required to qualify locally in order to buy the commodity produced in that state and remove it from that state.

IV.

APPELLEE'S ADOPTION OF TAXING RULES AS QUALIFICATION RULES

In deciding what activities are of sufficient quantum or quality to require qualification by a foreign corporation in a given state, it is said that two methods of approach have been adopted: (1) "balancing"—weighing the competing interests of federal free trade policy against the interest of the state in requiring qualification and in prohibiting enforcement of contracts made without qualification; and (2) "mechanical"—comparing the facts of the instant case with the facts of prior decisions.

Mechanically, Pittman is unable to reconcile his position with previous qualification cases, and therefore he attempts to support it with tax cases. That effort is also unsuccessful (see footnotes 3 and 6). His "balancing" analysis is equally deficient.

In a "balancing" analysis, the Supreme Court has investigated "whether the state's interest in the particular type of statute and in the activities in question is actually great enough to justify the imposition on the foreign corporation of the specific burdens involved." Note, *Corporate Registration: A Functional Analysis of Doing Busi-*

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Pittman has pointed out that after the decision in this case, Allenberg qualified to do business in states where it buys cotton. **Motion to Dismiss or Affirm**, pp. B-1 — B-12. Allenberg took this step because, under the decision below, access to markets to buy cotton was foreclosed without qualification.

ness, 71 Yale L.J. 575 (1962); *Southern Pacific Co. vs. Arizona*, 325 U.S. 761 (1945).[5]

What are the interests of the State of Mississippi in requiring qualification as a condition precedent to making contracts to purchase cotton there? Originally, corporate qualification statutes were intended to assure that local residents could sue foreign corporations in local courts. In the 19th Century, when most of the states first enacted qualification statutes, long arm statutes were not widespread, and assertions of jurisdiction over companies not physically present in the states was a difficult process. In the climate of that age the quali-

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[5] The **Restatement, Second, Conflict of Laws** §311, adopts a balancing analysis in determining the degree of activity which may be conducted in a state without local qualification under a typical "doing business" statute. But the Restatement declines to define "interstate commerce," or to discuss what may constitute an "undue burden" on interstate commerce. [§311, comment d.] The balancing analysis suggested by Pittman lists four "benefits" Allenberg has allegedly "received from the state": 1) access to the state's major agricultural commodity; 2) using facilities in the state to compress and classify cotton; 3) use of warehousing facilities; 4) protection of cotton by police and fire departments while warehoused. Brief of Appellee, p. 43.

"Benefit" (1) is afforded to Allenberg by the Commerce Clause, not the State of Mississippi. With regard to "benefit" (2), Allenberg classifies cotton in its Memphis office not in Mississippi. The remaining benefits merely amount to the fact that for a period of time between delivery of documents in Tennessee and issuance of specific shipping orders from Tennessee, the cotton is located in the compress and warehouse where it was placed by the farmer. As pointed out above, this is essential to interstate commerce in cotton.

Presumably the local warehouse company pays real property and privilege taxes in connection with the warehouse facility and business, benefit (3); and pays state and local taxes for fire and police protection, benefit (4); and these payments are reflected in the warehouse charges. The warehouse assumes the risk of loss of the cotton for which it has issued a receipt (United States Warehouse Act, 7 U.S.C. §262), and thus the warehouse, not Allenberg, is the recipient of benefits (3) and (4).

fication statutes were justified by the need to assure local residents that foreign corporations could be sued locally. However, the decisions of the U. S. Supreme Court have now made it possible to obtain jurisdiction over foreign corporations in local courts without the aid of the qualification statutes. *International Shoe Co. vs. Washington*, 326 U.S. 310 (1945). Long arm statutes are now in effect in every state, and local residents can obtain jurisdiction to sue a foreign corporation in connection with business done in the state whether that business is qualified or not. *International Harvester Co. vs. Kentucky*, 234 U.S. 579 (1914).

Pittman has recognized that the original justification of the qualification requirement is no longer valid, and he does not place heavy reliance on it. Pittman advances only one real reason as a justification for the Mississippi type law: the state interest in taxation. According to Pittman, the primary purpose of the qualification requirement is to solicit information (Brief of Appellee, page 33), which is in turn useful to the State of Mississippi in imposing its taxes. Brief of Appellee, pages 25-28. Consistent with his attempt to justify qualification requirements by the state taxing interest, Pittman argues in favor of a merger of the constitutional rules concerning jurisdiction to tax and jurisdiction to impose qualification requirements.

This argument is the subject of this portion of Appellant's Reply Brief.

Much of Pittman's Brief is devoted to the argument that this Court should adopt the case law rules (as interpreted by Pittman) concerned with state power to impose ad valorem personal property taxes as an appropriate body of law from which to borrow rules regarding state

power to require qualification of foreign corporations.

Pittman asks the Court to adopt his reformulation of the principles of *Coe vs. Errol*, 116 U.S. 517, and *Kosydar vs. National Cash Register Company*, 42 L.W. 4767 (1974), as a test of the state's power to require qualification. Brief of Appellee, page 15.[6] Citing these tax cases, Appellee asks the Court to adopt a rule requiring actual movement of the goods purchased prior to or contemporaneous with passage of title to the buyer, as a test of the state's power to require qualification. Brief of Appellee, pages 10-15. Although it requires reworking of the ad valorem tax cases to state a qualification test from them, presumably what Appellee suggests is that an out of state corporation making an executory contract to purchase goods must qualify in the state of origin of the goods in every case where title to the goods purchased is to pass to the buyer before the goods are shipped. But is this a desirable standard for the imposition of qualification requirements? Allenberg believes that examination of this proposal will show that it is not.

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[6] Pittman also relies heavily on **Chassinol vs. Greenwood**, 291 U.S. 584 (1934). **Chassinol** is not only distinguishable from Pittman's position, it supports Allenberg. In that case the Court held that the City of Greenwood, Mississippi could impose a license tax on cotton buyers who were local residents of the city. In that opinion the court stated that the sale of cotton by a local farmer to a local buyer is not in interstate commerce. [291 U.S. at 587]. The court then specifically pointed out that a sale to a buyer outside the State of Mississippi would be a sale in interstate commerce. [291 U.S. at 587]. Contrary to the statement in Appellee's Brief at page 3, **Chassinol** does not hold that Allenberg's cotton buying in Mississippi is taxable. As pointed out above, **Chassinol** expressly recognizes that an out of state purchaser buying cotton from a local seller makes a purchase in interstate commerce.

Similarly, **Parker vs. Brown**, 317 U.S. 341 (1945), merely found that a sale by a local seller to a local buyer was intrastate commerce; and does not support Pittman.

First, such a test would mean that a foreign corporate buyer must qualify in every case where an executory contract is made to purchase goods under which there will not be contemporaneous shipment at the time of the delivery to the buyer. As a practical matter Pittman's proposed rule would require every corporation in the nation which makes contracts to purchase goods which are warehoused by the *seller* and shipped after title has passed to the buyer, to qualify in every state where the goods are purchased. Thus a large part of the agricultural merchandising industry, if not all of it, would be required to qualify to do business in every state where purchases are made; and every business which buys goods on presentation of negotiable storage documents would have to qualify in each state in which purchased goods are warehoused.

Secondly, such a test would irrationally distinguish in constitutional effect between purchases of goods which are capable of being shipped contemporaneously with passage of title to the buyer, and purchases of goods over which the buyer must assume control before shipping destinations can be ascertained. In the latter category are purchases of goods for resale, and purchases of goods for which negotiable storage documents are issued, which are shipped pursuant to the purchaser's instructions after purchase. Warehousing of farm goods is a federally regulated function (under the United States Warehouse Act, 7 USC Sec. 241 et seq.) because Congress has recognized that trade in interstate commerce in those goods will be facilitated by the free exchange of negotiable warehouse receipts. The rule proposed by Appellee would mean that any buyer of otherwise negotiable storage documents for corn, tobacco, flaxseed, wool, wheat, soybeans, etc., would have to refuse tender of receipts for goods stored in states where it was not qualified to do business, i.e., it would make the receipts not freely negotiable.

Pittman's rule also is inconsistent with the previous decision of *Shafer vs. Farmers' Grain Co.*, 268 U.S. 187 (1925) where the buyer purchased wheat and took delivery at grain elevators in North Dakota for subsequent shipment by the buyer to its out of state customers. In *Shafer* this Court held that such purchases were made in interstate commerce, and that the state of North Dakota could not require local licenses as a condition precedent to engaging in that activity, although shipment occurred after passage of title to the buyer.

Pittman acknowledged that modification of *Shafer* is necessary to support his position (Brief of Appellee, p. 21). But such re-examination is inappropriate in the light of congressional language in federal statutes and legislative findings of the scope of interstate commerce in the cotton industry. Commodity Exchange Act, 7 USC Sec. 3; Cotton Research and Promotion Act, 7 USC Sec. 2101. There is no way to reconcile the holding, much less the language, of *Shafer* with the standard proposed by Pittman. Indeed the analysis of course of dealing in *Shafer* and *Lemke vs. Farmers' Grain Co.*, 258 U.S. 50 (1922) is peculiarly applicable in this case where virtually all cotton produced in Mississippi is shipped out of the state.

Adoption of Pittman's proposal would clearly be forging new doctrine. There is no way to square that result with *Flood vs. Kuhn*, 407 U.S. 258 (1972). The new doctrine proposed by Pittman would affect existing contracts made on the basis of current understanding of the law, without prior warning to innocent parties, and thus, under *Flood* is an appropriate matter for Congress to address by the exercise of its power to redefine the scope of the commerce clause. *State Board of Insurance vs. Todd Shipyards*, 370 U.S. 451 (1962); *Prudential Insurance Co. vs. Benjamin*, 328 U.S. 408 (1946).

Appellee's proposed new formula would replace settled law with new and difficult legal questions of qualification turning on the wording of contracts, contemplation of the parties, and time of title passage rather than actual movement of the goods in interstate commerce. In *Kosydar vs. National Cash Register Co.*, 42 L.W. 4767 (1974), the Court emphasized the need for a concrete and simple standard from which businessmen and state officials could easily determine the time at which goods became immune from ad valorem taxation by reason of the export clause. In *Kosydar* the Court reaffirmed the long established rule of *Coe vs. Errol*, 116 U.S. 517 (1886), that goods do not become immune until they *actually* begin to move. Appellee's proposed rule for qualification, ostensibly derived from *Coe vs. Errol* and *Kosydar*, flounders on the need for a simple and direct standard.

Present law, under *Dahnke*, *Shafer*, and *Lemke*, adheres to the *actual* movement test. Existing law under these precedents holds that state qualification and licensing requirements are not requisite for the making of contracts to purchase goods which *actually* are to be shipped in interstate commerce. Under existing law this rule obtains regardless of fine legal distinctions regarding time of passage of title. Thus the purchases in *Shafer* and *Lemke*, where delivery was made at grain warehouses in state for interstate shipment by the buyer thereafter, and the purchases in *Dahnke*, where deliveries were made FOB carrier, were equally exempt from local licensing and qualification requirements.[7] In turning on

[7] Fletcher, **Cyclopedia Corporations** §8415, pp. 374-5, cited at page 18 of Appellee's Brief in apparent support of Appellee's position, actually supports Allenberg. Fletcher states: "The purchase of goods by a foreign corporation for shipment to another state constitutes interstate commerce [here footnoting **Shafer vs. Farmers' Grain Co.**, 268 U.S. 189] and the commerce includes the purchase quite as much as it does the transporta-

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actual movement, existing qualification law is wholly consistent with *Coe vs. Erroll* (and, of course, in the many years that *Coe vs. Erroll* and *Dahnke* have been on the books there has never been a suggestion that they are not consistent).

Appellee, however, introduces a new and cumbersome concept. Appellee proposes that despite the fact that the goods actually are purchased for shipment out of state, the local qualification requirement should be imposed on out of state purchasers who take title to the goods before shipment begins. A businessman, or a state official, applying such a rule must ignore the *actual* shipment of the goods in interstate commerce by the buyer, and examine the terms of each contract of purchase to determine whether time of title passage is before or after the shipment.

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tion [here footnoting **Dahnke-Walker Milling Co. vs. Bondurant**, 257 U.S. 282]." Pittman quotes this same sentence at Appellee's Brief, P. 18, but omits the citation to **Shafer**, and claims that the quotation supports his argument (that title passage must come at the time of or after shipment). It is evident that in citing **Shafer**, Fletcher does not support Pittman's argument and does not "distinguish **Dahnke**" on the basis claimed in Appellee's Brief at p. 18.

The case of **Superior Oil Co. vs. Mississippi**, 280 U.S. 390 (1929), contrary to Appellee's Brief at pp. 16-17, does not turn on the storage of the oil. In that case Mississippi levied at 3¢ per gallon tax on a local corporation selling oil to a local fish packing business. The fish packer then resold the oil to shrimp fishermen at Biloxi, Mississippi, who used the oil to fish in fishing grounds off the Louisiana coast. The court found the seller's connection with the fishermen's use of the oil too remote to make the sale a transaction in interstate commerce, and stated: "...it seems to us that the connection of the seller with the steps taken by the buyer after the sale was too remote to save the seller from the tax." [280 U.S. at 396].

In **Superior Oil** the purchaser did not remove the oil but resold to another purchaser who did. In contrast, Allenberg purchased the cotton, and Allenberg (not its customer) removed the cotton from the state.

Furthermore, Pittman's proposed rule rests on an interpretation of only two ad valorem tax cases having to do with the taxation of goods in the hands of the *seller* (*Kosydar*) or having no sale involved at all (*Coe v. Errol*). Other ad valorem tax cases which are more in point because they address the ***buyer's*** situation, indicate reason to doubt that Allenberg's cotton would be subject to ad valorem taxation in Mississippi during temporary storage after purchase by Allenberg. Hence, even under the proposed standard, Allenberg would not be required to qualify to do business in Mississippi. ***Carson Petroleum Company vs. Vial***, 279 U.S. 95 (1929)(ad valorem tax may not be imposed on property temporarily stored in state by foreign buyer pending resale by buyer and delivery on ships).

There is another fundamental flaw in Pittman's argument. Pittman asks the Court to decide whether Allenberg should be required to qualify in Mississippi by applying his interpretation of the rules applicable to ad valorem taxation in ***Coe vs. Errol*** and ***Kosydar***. This argument stems from Pittman's attempt to justify the Mississippi qualification requirement by the interest of Mississippi in taxing cotton belonging to Allenberg while it was in the compress and warehouse. But Mississippi does not tax such cotton, nor does it impose a net income tax on an out of state merchant buying cotton in Mississippi for resale outside of the state. Mississippi Code 1972 Annotated §§27-7-23 (quoted at Page 26, infra), 27-31-1 (quoted below).

Pittman actually argues that the state's interest in requiring qualification in this case is justified by the ***possibility*** that a Mississippi law ***might*** impose an ad valorem tax on the cotton in the compress and warehouse while Allenberg had title to it.

Mississippi does not impose an ad valorem tax on the cotton in Allenberg's hands. Mississippi expressly exempts from ad valorem taxation all cotton in Mississippi for five years after harvest.

Mississippi Code 1972 Annotated Sec. 27-31-1 provides:

> "*The following shall be exempt from taxation*: . . . .
> (i) all farm products grown in this state for a period of two years after they are harvested, when in the possession of or the title to which is in the producer, except the tax of one-fifth of one cent per pound on lint cotton now levied by the Board of Commissioners of the Mississippi Levee District; and *lint cotton for five years*, and cottonseed, soybeans, oats, rice and wheat for one year *regardless of ownership*." (emphasis added)

In order to accept Pittman's justification of qualification by the state interest in taxation in this case, this Court would need to render an opinion based upon a non-existent Mississippi taxing statute which hypothetically would impose an ad valorem tax on property belonging to foreign corporations even though the property was paid for upon delivery of negotiable documents out of state and even though it was shipped out of state as soon after delivery as the goods could be classified into shipping lots. This Court would not only have to assume the existence of such an imaginary taxing statute, it would then be required to assume its constitutionality. In effect the Court would be required to issue an advisory opinion on the constitutionality of a non-existent state ad valorem tax.

If this Court wished to merge the rules regarding state power to impose ad valorem taxation and state power to require qualification, a sounder approach would be to wait until the Court is presented with a case in which a state

actually asserted an ad valorem tax. The question whether a state could design a taxing statute constitutionally to reach the cotton temporarily stored in Mississippi after title passes to a foreign buyer but before it leaves the state, is a question for another case, and is not properly before the Court on this record.

Such an inquiry is not appropriate in this case where the state has chosen not to impose an ad valorem tax. Whether Mississippi might impose such a tax is not the proper criterion for deciding whether or not it can require qualification. The proper criterion for deciding this case is to examine the nature and importance of the ***actual*** interest of the state in requiring qualification, and balance it against the interests of the federal free trade policy.

Pittman's argument would extend qualification jurisdiction beyond the exercise of the state's taxing jurisdiction, in conflict with current understanding of the law, and heedless of the effect of judicial change in the law on existing contracts. Cf. *Flood vs. Kuhn*, 407 U.S. 258 (1972). It also ignores considerations of market access which have distinguished this Court's analysis of qualification cases from its analysis of tax cases (discussed infra).

In an alternative argument Pittman suggests another far reaching change in the constitutional law of qualification, Pittman points out that the states are now allowed to impose net income taxes on interstate businesses. ***Northwestern States Portland Cement Co. vs. Minnesota***, 358 U.S. 450 (1959). Brief of Appellee, page 40. He then suggests that limitations on state power to impose qualification requirements have "outlived their usefulness", and proposes that the Court do away with such limitations. Brief of Appellee, page 41.

Pittman argues that since the states can tax interstate businesses, they should be allowed to impose qualification requirements upon interstate business, and that the two standards should be merged.

But the predicate of this argument is false. The *unqualified* assertion that the states can tax interstate businesses is not correct. There are limitations on the power of the states to impose taxes on interstate business. These limitations are constitutional rules designed by this Court on a case by case basis when dealing with actual assertions of state taxing power. The limitations are different for each type of state tax: net income taxes, ***Northwestern States Portland Cement Co. vs. Minnesota***, 358 U.S. 450 (1959); ad valorem personal property taxes, ***Kosydar vs. National Cash Register Company***, 42 L.W. 4767 (1974); gross receipts taxes, ***Sonneborn Bros. vs. Cureton***, 262 U.S. 506 (1923); franchise taxes, ***Spector Motor Service vs. O'Connor***, 340 U.S. 602 (1951); sales taxes, ***McLeod vs. J. E. Dilworth Co.***, 322 U.S. 327 (1944); use taxes, ***General Trading Co. vs. State Tax Commission***, 322 U.S. 335 (1944); etc. These varying rules are not adaptable for use as qualification standards.

Appellee has assumed that merging the rules with regard to jurisdiction to tax with the rules with regard to jurisdiction to require qualification would avoid questions of where to draw the line. However, this assumption is not based on reality. A line would still have to be drawn at some point.[8] In the area of state taxation, on a case

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[8] Of course, no line would have to be drawn if the Court held that all interstate business must qualify in every state where any activity is conducted, however minimal. Allenberg does not believe

(Continued on following page)

by case basis, the Supreme Court has balanced the states' interests against federal free trade policy in determining the validity of imposing different types of state taxes on interstate businesses. In similar manner, the Court cannot avoid balancing the competing interests of the states and federal free trade policy in determining when state requirements for qualification may be imposed on interstate business.

The beginning point for Pittman's argument is the statement that "the majority and dissent in *Lilly* agree that defining intrastate commerce for purposes of qualification requires the utilization of licensing and privilege tax decisions." Brief of Appellee, pages 10-11. From that point Pittman leaps to the conclusion that taxation and qualification may be equated. Brief of Appellee, p. 15.

Pittman fails to realize that it is a far different thing to merge the rules regarding qualification with the rules regarding privilege and license taxes, than it is to merge the rules of qualification with the rules regarding jurisdiction to impose other types of taxes, such as net income. *Northwestern States Portland Cement Co. vs. Minnesota*, 358 U.S. 450. —

(Continued from preceding page)

the Court would seriously consider such an idea, since, under a balancing analysis, in going beyond the states' taxing interest, the qualification requirement would be extended to the point where the states' interest would be so small that the Court would not tolerate even a minimal burden on interstate commerce.

Qualification requirements are anything but minimal burdens (even ignoring the burdensome "no-cure" penalty discussed infra). Administrative costs of filing corporate qualification papers, and refiling each year, are similar to the administrative costs of filing local tax returns. The administrative costs to interstate businesses of filing tax returns have been recognized as even more burdensome, in many cases, than the cost of paying state taxes on interstate business. House Comm. on the Judiciary, Special Subcomm. on State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong. 2d Sess., vol. 1, at 598 (1964).

Eli Lilly refused to accept the *Northwestern States Portland Cement* rationale in a qualification case, and expressly reaffirmed the doctrine of absolute immunity from qualification for interstate transactions [366 U.S. 279]. Mr. Justice Harlan, concurring, was especially concerned about the market foreclosure effect of the qualification requirement [366 U.S. 286]. This feature distinguishes qualification and license taxes (where the concern is market foreclosure) from revenue producing taxation (where the concern is fairness to interstate commerce).[9]

While the state has a legitimate interest in securing tax revenues, it does not (contrary to Appellee's Brief p. 43) have the authority to grant or deny access to Mississippi's major agricultural commodity. Access is guaranteed by the Commerce Clause, and the Court reaffirmed that unequivocally in *Eli Lilly*. The state cannot exercise a power it does not have to grant or deny access to its markets through a qualification requirement, as a device to implement its taxing power. Alternative means of effecting its tax assessments and collections must be used by the state which do not impede market access.

An example of the considerations distinguishing qualification cases from ad valorem tax cases is shown by the differing treatment the *Kosydar* situation requires when qualification is considered. The comparable situation in

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9 Reading **Eli Lilly** this way shows that there is no "inexplicable conflict" (Appellee's Brief, p. 43) between **Scripto, Inc. vs. Carson**, 362 U.S. 207 and **Eli Lilly. Scripto** followed **Northwestern States** in a use tax situation, holding that sales through an independent contractor do not relieve the vendor of his duty to collect a state use tax. But **Eli Lilly** refused to follow **Northwestern States** in a qualification case because of a concern for access to local markets in that case which was not present in Scripto.

Kosydar would be the following: the foreign corporate buyer contracts with National Cash Register (NCR) to buy the machines which were held to be taxable in *Kosydar*. The price of the machines goes up before time for delivery to the buyer and NCR refuses to perform claiming that the buyer should have qualified to do business in Ohio (where the machines were to be produced and delivered). Under Pittman's proposal, this would be a valid defense, even though the buyer would have shipped the machines out of state after delivery. Under Pittman's proposal, buyers would be careful not to make contracts to purchase from NCR or other Ohio sellers unless they had previously qualified in Ohio. Buyers only potentially or slightly interested in the Ohio market would not qualify there or make purchases there.

Pittman's argument that businesses engaged in interstate commerce may be required to qualify wherever they may be subject to net income taxation also conflicts with the Mississippi statute which expressly exempts foreign corporations from qualification requirements if they are "transacting any business in interstate commerce." Mississippi Code (1972) § 79-3-211(e). (Note that in arguing that this Court can interpret the state interstate commerce exemption out of existence, Pittman must abandon his posture that interpretation of this exemption is purely a matter of state law (see Appellee's Brief, pp. 47-8), and admit that the exemption is an example of federal law incorporated by reference in the state statute, as argued by Allenberg. Appellant's Brief, pp. 52-59.)

But even if these problems are ignored, and it is assumed that merger of tax and qualification rules is desirable and achievable, the Court is asked by Pittman

to take the additional step of holding that all interstate businesses must qualify in every state in which they *might* be subject to a net income tax—even if they are not actually subject to such a tax (as Allenberg is not in Mississippi). After taking this step, the Court would then be required to determine whether, on the facts of this case, the State of Mississippi might constitutionally be allowed to impose a net income tax on Allenberg Cotton Company, Inc. The Court would have to consider every possible type of tax apportionment formulae which the State of Mississippi hypothetically might legislate. This of course, would lead the Court into an ethereal realm of rampant speculation, in which the members of the Court would be required to design imaginary taxing statutes for the State of Mississippi. Again, the Court would be called upon to render an advisory opinion on hypothetical legislation.

The states have met with much less success in imposing taxes on interstate *buyers* of goods than on sellers. Previous cases involving buyers give rise to substantial doubt that Mississippi could impose a net income tax or other tax on Allenberg merely because of its purchases. *Michigan - Wisconsin Pipe Line Co. vs. Calvert*, 347 U.S. 157 (1954); cf. *Richfield Oil Corp. vs. State Board of Equalization*, 329 U.S. 69 (1946).

If the Court were to hold that a given state may impose qualification requirements on all foreign corporations upon which it *might* constitutionally impose a net income tax even though the state does not actually do so, the burden of legal and administrative costs of compliance by interstate businesses would be overwhelmingly out of proportion to the benefit to the states. It is difficult and expensive for interstate businesses to determine whether

they are liable for taxes even when considering actual state taxing statutes.[10] To be required to determine liability for qualification on the basis of hypothetical tax laws would be still more onerous. Yet this burden would not produce any additional state tax revenues.

The State of Mississippi's power to tax foreign corporations is probably greatest when it imposes net income taxes. *Northwestern States Portland Cement Co. vs. Minnesota*, 358 U.S. 450 (1959).

Mississippi expressly exempts from taxation, income derived from the purchase of cotton in Mississippi and sale elsewhere. Mississippi Code 1972 Annotated Section 27-7-23 provides, in defining net income of foreign and domestic taxpayers:

> "(3) ***Gains, profits, and income derived from the purchase of personal property within and its sale without the state***, or from the purchase of property without and its sale within the state, ***shall be treated as derived entirely from the state in which sold.***" (emphasis added)

If the application of the Mississippi qualification requirement in this case is justified by Mississippi's potential

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10 "For large corporations with well-staffed accounting and legal departments, the added costs [of compliance with state tax filing requirements in multiple states] may be tolerable. But for small manufacturers and wholesalers who by their sales incur tax liability all over the country, the accounting burden of complying with many tax statutes may be heavy; occasionally such costs oblige a small business to narrow the scope of its interstate operations. Merely the legal expenses of analyzing its interstate tax liabilities may be prohibitive. Perhaps the thorniest problem for small businesses arises from the Supreme Court's increasingly liberal definition of 'nexus' sufficient to constitute a tax situs in a state." Note, **Developments in the Law, Federal Limitations on State Taxation of Interstate Business**, 75 Harv. L. Rev. 953, 973-74 (1962). For similar commentary see House Comm. on the Judiciary, Special Subcomm. on State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong. 2d Sess., vol. 2, at 594-95 (1964).

interest in taxing Allenberg's activities, the qualification requirement will have been extended beyond the actual exercise of state taxing power. This result would be in conflict with current understanding of the law,[11] and it would ignore the market foreclosing effect of qualification requirements (which are even more serious when coupled with a "no-cure" statute like that of Mississippi).

Such a hypothetical or speculative state interest does not justify the real burdens imposed on interstate commerce by the decision below.[12]

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11 In a case where the state's only interest of substance is in acquiring information in connection with its taxing power, extending qualification requirements beyond the point to which the state has actually extended its taxing power, gives rise to the same problems discussed in footnote 8, supra.

It is clear that under current understanding of the law more activity within a state is required to enable the state to impose qualification requirements than that which would enable a state to impose taxes (or to exercise jurisdiction). "It is generally thought that a 'higher degree' of doing business in a state is necessary to subject a corporation to a licensing statute than is necessary in the case of a taxing statute." Comment, **Licensing of Businesses Engaged in Interstate Commerce**, 75 Harv. L. Rev. 138, 139 (1961); Issacs, **An Analysis of Doing Business**, 25 Colum. L. Rev. 1018, 1024-25 (1925); **Restatement, Second, Conflict of Laws**, §311, comment f. Since a change in the law would be required by Appellee's position, and such a change would affect existing commercial relationships established on the basis of current law, **Flood vs. Kuhn**, 407 U.S. 258 (1972), would mandate Congressional change of the law, if any change were thought desirable.

12 Of course, it is wholly circular to attempt to justify imposing Mississippi's qualification requirement on a business engaged solely in interstate commerce in Mississippi, on the ground that Mississippi has an interest in imposing a franchise or privilege tax on the interstate business in connection with those activities (as Pittman argues at page 27 of Appellee's Brief). A state franchise tax, even if fairly apportioned, may not be imposed on the privilege of doing business within the state if that business is interstate commerce. **Spector Motor Service vs. O'Connor**, 340 U.S. 602 (1951). If the activity in the state is interstate commerce neither a franchise tax, nor a qualification requirement, can be imposed. **Spector**; **Eli Lilly.**

V.
THE RELEVANCE OF FEDERAL LEGISLATION

Appellee argues that this Court should ignore Congressional legislation and policies in the agricultural sector unless there is a question of pre-emption of state law by federal statute. Brief of Appellee, page 20. This argument would come as a surprise to authors of previous opinions of this Court in which the application of state law has been challenged on Commerce Clause grounds. See for example, *Parker vs. Brown*, 317 U.S. 341, 363-368 (1945); and *H. P. Hood and Sons, Inc. vs. DuMond*, 336 U.S. 525, 544-5 (1949). The Commerce Clause is an affirmative grant of power to Congress and Congressional action is always relevant to its interpretation. It has long been recognized that "Congress has undoubted power to redefine the distribution of power over interstate commerce." *Southern Pacific Co. vs. Arizona*, 325 U.S. 761, 769 (1945).

In *Parker vs. Brown*, the Court conducted an exhaustive review of Congressional agricultural laws and Department of Agriculture regulations, in determining whether there was a conflict between state law and the policies of the Commerce Clause. The Court stated in that case: "It is significant of the relation of the local interest in maintaining this [state marketing] program to the national interest in interstate commerce, that throughout the period from 1929 until the adoption of the prorate program for the 1940 raisin crop, the national government has contributed to these efforts by its establishment of marketing programs pursuant to Act of Congress or by aiding programs sponsored by the state." [317 U.S. 341, 364-5].

In the instant case, Allenberg has pointed out that Congress has created an extensive legislative framework

under which the agricultural production of the nation in general, and cotton in particular, is produced and marketed.

Specifically, since 1971 Congress has implemented fundamental changes in the farm allotment and price support system. These changes depend upon the continued viability of the practice of forward contracting to purchase cotton. Under present law no subsidy is paid cotton farmers so long as the market price of cotton stays above a target price set by the Department of Agriculture. Current legislation now allows the planting of cotton on acreage not covered by Department of Agriculture allotments, and there is no national price support protection for this cotton. The current farm program assumes that cotton farmers will be able to obtain operating capital, formerly available from government loans, from private sources by using forward contracts as collateral. The current farm program also assumes that cotton farmers will be able to protect themselves from price declines for cotton planted on non-allotment acreage by entering into forward contracts prior to planting. After implementing these changes the Department of Agriculture has publicly urged farmers to increase their use of forward contracts. See materials at Statement of the Case, page 25.

It would be ironic for this Court to accede to Appellee's contention that it should ignore these Congressional actions as irrelevant to the Commerce Clause analysis of the competing interests of the State of Mississippi and the needs of the national agricultural commodities market. An even greater irony would result if this Court, in the name of interpretation of the Commerce Clause, should uphold state requirements of qualification and state penalties which deprive forward contracts of economic validity if made without local qualification. Such a holding would deal a severe blow to the use of the forward contract in

the agricultural sector at the very time when national agricultural policy had been revamped to depend upon the forward contract as a substitute for government price supports and government loans of operating capital.

Moreover, the national government has long been extensively involved in maintenance and supervision of the national commodities markets, pursuant to the Commodity Exchange Act, 7 U.S.C. Sec. 1 et seq. The central economic function performed by the national futures markets is to establish a legal and economic climate in which merchandisers of agricultural goods can hedge their sales and purchases. This system allows merchants, such as Allenberg Cotton Company, Inc., to protect themselves against adverse price changes in the value of commodities, such as cotton, purchased by them for resale. In such a climate the merchant can pay the farmer more, and resell the cotton for less, than would be possible without hedging. See materials at Statement of the Case, pages 13, 19, 29. Hedging is the practice of offsetting purchases by sales, or vice versa. The Commodity Exchange Act makes it illegal to enter into other than bona fide transactions in interstate commerce in cotton. 7 U.S.C. Sec. 7c.

This national commodities merchandising system recognizes that entering into a contract to buy cotton, such as that between Allenberg and Pittman, is a transaction which itself has economic importance in the interstate commodities market. Yet the Supreme Court of Mississippi in this case has effectually required that before entering into such contracts the cotton merchant must have qualified to do business in Mississippi, and as a penalty for having failed to do so, these contracts have been deprived of economic validity by Mississippi's refusal to allow them to be enforced in its courts. This result is

completely inconsistent with the national commodities marketing system, which presupposes that both sides of the hedge—the purchase contract with the farmer, and the sale contract on the New York Cotton Exchange—will be of unquestioned legal and economic validity.

Surely these considerations cannot be ignored by this Court in interpreting the Commerce Clause.

VI.

THE "NO-CURE" MISSISSIPPI STATUTE

Appellee, in addition to asking the Court to hold that Allenberg should have qualified to do business in Mississippi, also asks the Court to validate the "no-cure" Mississippi statute as a constitutionally approved punishment for failure to qualify.

In practical economic effect, the most important aspect of this case is the fact that under Mississippi law if Allenberg Cotton Company, Inc., and the other cotton companies with existing forward contracts in Mississippi in 1973 were not qualified at the critical time,[13] they are forever absolutely barred from enforcing their contractual rights in state or federal courts in Mississippi, even if they should subsequently qualify to do business in Mississippi. Opinion of Mississippi Supreme Court, Jurisdictional Statement, page A-6; Mississippi Code Annotated (1942), Sec. 5309-239; *Parker vs. Lin-Co Producing Co.*, 197 S.2d 228 (Miss. 1967).

This key aspect of the instant case is the subject of very little direct discussion in Appellee's Brief.

On the other hand, Appellee's Brief contains many partial quotations which appear to support the "no-cure" statute.

[13] See footnote 17, infra.

The Appellee's Brief at page 6 quotes at length a Note in the Columbia Law Review, the incomplete quoted portion of which at first blush would appear to support the Appellee's argument that the Mississippi "no-cure" statute is a recommended tool for implementing state policy in connection with the imposition of qualification requirements. See Appellee's Brief, page 6, citing *Note, Sanctions for Failure to Comply with Corporate Qualification Statutes: An Evaluation*, 63 Colum. L. Rev. 117, 122-23 (1963). However, Appellee omits the conclusion of the Columbia Law Review Note which condemns the use of a statute such as that in effect in Mississippi:

> "Although denial of Court use is essentially a valuable device, specific provisions frequently contain imperfections....if qualification will not enable the corporation to sue on antecedent obligations, the sanction may be unduly severe, since the corporation may forfeit unreasonable sums while the parties with whom the corporation has dealt receive unjustifiable windfalls. On balance, the former approach [of allowing subsequent qualification to cure prior defects] must be preferred because it provides effective enforcement and yet is fair to the corporation. The need for deterrents can be met by a companion provision imposing monetary penalties."

In fact, not a single commentator cited in the Appellee's Brief champions the use of a "no-cure" statute which absolutely prohibits suits on antecedent contracts in order to enforce qualification requirements. The prior decisions of the U.S. Supreme Court, and the commentators, exhibit an abhorrence of such statutes. In *Sioux Remedy Co. vs. Cope*, 235 U.S. 197, 205 (1914), the Supreme Court unanimously struck down the application of a South Dakota law which prevented suit on a contract made antecedent to qualification. The Court stated:

"We think the mere statement of the conditions [of the state's qualification statute] shows that they have no natural or reasonable relation to the right to sue which they are intended to restrict. They have no bearing upon the merits or any question of procedure or costs, are not directed against any abusive use of judicial process, and are plainly onerous."

In *Dahnke Walker Milling Co. vs. Bondurant*, 257 U.S. 282 (1921), the Court was presented with a similar "no-cure" statute which would have prohibited enforcement of antecedent contracts, and the Court refused to apply the state statute.

In contrast, in *Union Brokerage Co. vs. Jensen*, 322 U.S. 202, 211 (1944), the Court upheld imposition of a no-suit penalty for failure to qualify where defects could be cured and suit could be maintained after qualification. The Court emphasized the non-discriminatory general application of the Minnesota qualification statute. The Minnesota statute under consideration in *Union Brokerage* had a "subsequent compliance" no suit sanction, and the Court in *Union Brokerage* distinguished the Minnesota statute from the South Dakota statute which was held not applicable to a corporation in interstate commerce in *Sioux Remedy Co. vs. Cope*, supra. Likewise, in *Eli Lilly & Co. vs. Sav-on-Drugs, Inc.*, 366 U.S. 276 (1961), the New Jersey qualification statute which was allowed to stand had a "subsequent compliance" no-suit sanction.

The commentators have recognized that forever barring suit on antecedent contracts is a punishment far out of proportion to the harm done by failing to qualify; as a survey of the authorities cited in the Appellee's Brief shows.

The Note, *The Legal Consequence of Failure to Comply with Domestication Statutes*, 110 U. Pa. L. Rev. 241, 257,

266 (1961), a part of which is cited in apparent support of the Appellee's argument at pages 7 and 8 of Appellee's Brief, does ***not*** conclude that the Mississippi type statute is a desirable instrument of state policy. That Note states:

> "...the protection of local interests hardly seems to require the total nullification of agreements consciously undertaken. If the concept of nullification were taken seriously, an otherwise innocent foreign corporation could as well be swindled by an angling domiciliary, as vice versa...
>
> "***where the statute declared that no suit could be maintained on contracts made by a non-complying foreign corporation, the same result [as in the statutes declaring contracts null] obtained."[14]

The Comment, *The Lilly Case: Dictum, Holding and Finding*, 57 N.W. U.L. Rev. 306, 322 (1962) cited at Appellee's Brief pp. 26, 38, comes to this conclusion:

> "...severe monetary penalties and closing the Courts to the corporation as Plaintiff are extreme methods considering the limited interests served. In addition, the no-suit sanction is questionable since positive action by the state can now be taken against the corporation doing business, and it must be so doing business to be within the qualification statute. Positive sanctions of fine or injunction would avoid a windfall to the Defendant and provide a reasonable method of enforcing qualification to serve the convenience of the citizens of the state."

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[14] The quoted Note criticizes the injustice of declaring contracts void, and points out that "no-cure" statutes have the same effect. It does point out, in the portion quoted in Appellee's Brief at pp. 7-8, that

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The Comment, *Foreign Corporations - State Boundaries for National Business* 59 Yale L.J. 735, (1950) cited in Appellee's Brief at page 26 reaches the following conclusion adverse to Appellee's position:

> "Whatever its value as a punitive device, this penalty [barring enforcement of an otherwise valid agreement even though there is qualification while the litigation is pending] does not serve to rectify the harm done by non-registration. The state's interest in registration lies in the receipt of taxes and the protection of its citizens against irresponsible acts. To deny a non-complying firm the right to enforce its agreements does not satisfy either of these interests, but instead confers a windfall on the person against whom the claim would be outstanding. Even considered as a deterrent rather than a remedial expedient, unenforceability of contracts is a crude and erratic punishment."

The Note, *Foreign Corporations: The Interrelation of Jurisdiction and Qualification*, 33 Ind. L.J. 358, 376 (1958) concludes:

> ". . . .insofar as qualification sought jurisdiction through actual consent and sought to induce compliance by a negative, self-enforcing, no-suit sanction, the present rules and the results thereunder are without reason. A noncomplying foreign corporation is denied access to the Courts through the application of a no-suit sanction on the ground that by its failure to qualify it has not made itself available to the local forum. But

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allowing curability is not as effective a punishment for failure to qualify as barring cure. But it does not recommend "no-cure". Instead, it recommends that a bonus be paid to litigants who uncover unqualified foreign corporations. Note, **The Legal Consequences of Failure to Comply with Domestication Statutes,** 110 U. Pa. L. Rev. 241, at 268 (1961).

in truth, if the state or a private party plaintiff sought to bring an action against the corporation, jurisdiction could be had. This is especially evident in those cases where the corporation is barred from suit only after engaging in activity in quantum equal to or greater than the prevailing standard needed for the acquisition of personal jurisdiction. The result is that defendants to actions brought by corporate plaintiffs are often relieved of their just obligations, a result that should be permitted only if necessary to serve a greater public interest. Such justification is lacking now and perhaps always has been."

Similar criticism of the Mississippi type statute is found in Note, *Right of a Foreign Corporation to Sue Upon Contracts in Montana Courts - Doing Business - Failure to Qualify - Subsequent Qualification*, 36 Mont. L. Rev. 218 (1965), (cited in Appellee's Brief at pp. 7-8).

In *Woods vs. Interstate Realty Company*, 337 U.S. 535, 539-40 (1949), the Court held, on *Erie* principles, that the Mississippi "no-cure" statute was substantive law of the state which must be applied by a federal court sitting in a diversity case. Mr. Justice Jackson, in a stinging dissent, issued a strong criticism of the merits of the Mississippi "no-cure" law: "Absolute prohibition of access to the Courts as a penalty for failure to qualify is a 'harsh, capricious and vindictive measure'***... the amount of this punishment bears no relation to the amount of wrong done to the State in failure to qualify and pay its taxes. The penalty thus suffered does not go to the State, which has sustained the injury, but results in unjust enrichment of the debtor..."

In the instant case, unlike *Woods vs. Interstate Realty Co.*, *Eli Lilly and Company, Inc. vs. Sav-on-Drugs, Inc.*, and *Union Brokerage Co. vs. Jensen*, the Court is presented

directly with the question whether the "no-cure" statute is to be a constitutionally approved instrument of state policy, or whether its application to contracts made by interstate businesses is in conflict with the policies of the Commerce Clause. The Court cannot affirm the decision below without validating the Mississippi "no-cure" statute and the unjust and disruptive effect the statute will have on the cotton industry, and on existing contracts in other industries.

In weighing the competing interest of federal free trade policy against the interest of the state in prohibiting enforcement of contracts made without qualification, what is the justification for the application of the Mississippi law? According to Pittman the requirement of qualification is necessary to solicit information which is in turn necessary to assist the State of Mississippi in its taxing program. Presumably, the harsh "no-cure" statute also is justified by the state interest in taxation.

However, as pointed out above, the State of Mississippi does not impose a tax on Allenberg in this situation. It would be a startling anomaly to justify the "no-cure" penalty statute, which has been condemned by so many commentators and by prior decisions of this Court, on the basis of the Mississippi interest in taxation when no tax is in fact imposed.

Mr. Justice Jackson stated: "...the amount of this punishment bears no relation to the amount of wrong done to the State in failure to qualify and pay its taxes." *Woods vs. Interstate Realty Co.*, 337 U.S. 535, 539-40 (1949). That statement is doubly true in the instant case because no wrong has been done to Mississippi by Allenberg's failure to qualify, because no taxes were imposed.

The "no-cure" statute will cause incalculable financial hardship in the numerous pending suits in Mississippi,

Alabama and Arkansas on 1973 cotton contracts if its use is upheld by this Court. The ramifications of such a ruling would be staggering. The 1973 forward contracts to purchase cotton were only one link in the distribution process which is worldwide. Over h lf of the United States 1973 cotton crop was resold by cotton merchants to foreign purchasers. If contracts with the initial source of supply (farmers in Mississippi, Alabama and Arkansas) cannot be enforced, the financial viability of a significant portion of the nation's cotton industry will be jeopardized.

If this Court expands state power to require corporations like Allenberg to qualify in all states where contracts to purchase are made, and together with such a ruling it approves the "no-cure" statute, it will create a legal precedent which can be used in the states presently having "no-cure" statutes, by all persons who find it to their current advantage to breach existing contracts affected by the ruling. The tragic hardships imposed upon the cotton industry in 1973 by the ruling of the Mississippi Supreme Court in this case will be felt by innocent contracting parties in other industries. Who those parties will be, or what industries will be affected, cannot be predicted by counsel for Allenberg. However, it is known that those hardships will be felt in the cotton industry in the three important cotton producing states of Mississippi, Arkansas and Alabama. At the present time a great number of 1973 forward contracts to purchase cotton are still in litigation in those three states. Despite the great number of suits filed after the 1973 price rise in cotton, only one Court has held that making those forward purchase contracts required local qualification: the Mississippi Supreme Court in the instant case.

As previously pointed out, the United States district courts in the States of Mississippi and Alabama have held

that the 1973 forward contracts were made in interstate commerce, e.g. *Cone Mills Corp. v. Hurdle*, 369 F. Supp. 426 (N.D. Miss. 1974); *Reigel Fiber Corp. v. Ellis Brothers*, N.D. Ala., No. 73P-954 (1974). If this Court were to reverse decisions so holding, and were to hold not only that qualification was required, but also that the "no-cure" statute is not an unconstitutional burden on interstate commerce, a significant portion of the nation's cotton industry would be dealt a staggering blow. Yet such a ruling would not increase the tax revenues of the State of Mississippi. Nor would such a ruling assist citizens of Mississippi to obtain jurisdiction over foreign corporations they could not presently reach by service under the long arm statute. The only persons benefited by such a ruling would be those cotton producers who willfully and solely for personal gain, repudiated their forward contracts for the sale of cotton—to the comparative financial detriment of their neighbors who honorably lived up to their contractual commitments and performed their contracts in 1973 despite the price rise.

Considerations such as these have led the commentators cited above to condemn the use of the "no-cure" statutes. For similar reasons forty-four states [15] have eschewed the use of "no-cure" statutes. For such reasons the Supreme Court has refused to apply "no-cure" statutes in *Dahnke Walker Milling Co. vs. Bondurant*, 257 U.S. 282 (1921), *International Textbook vs. Pigg*, 217 U.S. 91

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[15] Appellant's Brief, at 105, cites a study [C. T. Corporation, **What Constitutes Doing Business** (1973) p. 3] which listed five states (Alabama, Arizona, Arkansas, Mississippi and Vermont) in which the statutory bar to enforcement of contracts by a non-qualified foreign corporation could not be removed by subsequent qualification. Montana is the sixth state where this result obtains. Note, **Right of a Foreign Corporation to Sue upon Contracts in Montana Courts - Doing Business - Failure to Qualify - Subsequent Qualification**, 26 Mont. L. Rev. 218 (1965).

(1910), and *Sioux Remedy Co. vs. Cope*, 235 U.S. 197 (1914), while in contrast the Court has upheld the imposition of qualification requirements by states having "subsequent compliance" statutes in *Union Brokerage Co. vs. Jensen*, 332 U.S. 202 (1944),[16] and *Eli Lilly and Co., Inc. vs. Sav-on-Drugs, Inc.*, 366 U.S. 276 (1961).

Pittman has pointed out that Allenberg Cotton Company, Inc. has qualified to do business in Mississippi while this appeal is pending. Motion to Dismiss or Affirm, page B-12. If this Court should hold that Allenberg should have qualified to do business in Mississippi, it should couple that conclusion with a holding that the Mississippi "no-cure" statute is a burden on interstate commerce which goes beyond that necessary to promote the local interest involved. *Pike vs. Bruce Church*, 397 U.S. 137 (1970). It should strike down the "no-cure" statute as applied to Allenberg, and hold that Allenberg, having qualified while this litigation is pending, may now obtain legal redress in the courts of Mississippi, and it should remand the case for entry of judgment against Pittman. Similar procedures have been followed in states having "subsequent compliance" statutes. See for example, *J. R. Watkins Co. vs. Floyd*, 119 So. 2d 164 (La. 1960); *Inn Operations, Inc. vs. River Hill Motor Inn Company*, 152 N.W. 2d 808 (Iowa 1967) (under Model Bus. Corp. Act).

The foregoing discussion speaks to the adverse effects on existing trade relationships of a dual ruling requiring qualification and approving the "no-cure" statute. Even less compelling reasons led the Court to decline to disturb older precedents in *Flood vs. Kuhn*, 407 U.S. 258 (1972).

16 Pittman has claimed that "there are no significant differences between the Mississippi Code and those provisions at issue in **Union Brokerage vs. Jensen**, 322 U.S. 202 (1944)." Brief of Appellee, p. 37. This statement is not correct. The statute in **Union Brokerage** was a "subsequent compliance" statute, it was not a "no-cure" statute.

The devasting effect on existing contracts is not disputed by Appellee in his Brief. Nor does Appellee's Brief contravert the adverse prospective effect on composition which Allenberg has pointed out would result from an affirmance of the decision below. See Brief of Appellant, pages 95-98. If the ruling proposed by Pittman were adopted by this Court as the law of the land, *no rational prospective buyer of goods for interstate shipment would ever submit an offer to purchase goods in a state where it had not previously qualified to do business if that state had a "no-cure" statute.* [17] As a result, buyers would conduct activities only in previously established areas of interest. A substantial barrier to potential entry into markets of tangential interest would have been raised.[18]

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17 Under the ruling of the Mississippi court, if an offer to buy were submitted without prior qualification, upon acceptance a contract would exist which could be enforced against the buyer, but which could be repudiated at will by the seller. Thus no rational buyer would even bid in Mississippi without prior qualification, in fear of bidding successfully.

Pittman claims, at Appellee's Brief p. 45, that Mississippi "extends an invitation for foreign corporations to do all the business they desire without qualifying and it is only; (1) at the point where a contract is breached; and (2) no other alternative exists for enforcement except utilization of the state's court system, that a penalty comes into play." This ignores reality. Mississippi requires qualification prior to the time a cause of action accrues. **Parker v. Lin-Co Producing Company**, 167 So. 2d 228 (Miss. 1967); **Opinion of the Mississippi Supreme Court**, reprinted in Jurisdictional Statement, at p. A-6. An unqualified corporation entering a contract in Mississippi does so in peril of having the contract repudiated without legal recourse from the instant the contract is effective until qualification has been accomplished. In this situation no contract would be made until after qualification.

18 The anti-competitive effect of such a result is obvious. For the same or similar reasons the great majority of state courts have avoided decisions which would discourage potential competition. They have used varying devices to avoid that result. One widespread device has been to hold that **merely entering into** or making a contract to do business in a state is not "doing business" there, even if the contract contemplates performance in the state which would be of sufficient local importance to require qualification. Thus, **Fletcher, Cyclopedia of Corporations**, Vol. 17, Section 4868,

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This Court has emphasized the relevance of alternatives in its analysis in similar cases. The existence of alternatives which are less intrusive to the federal interstate

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pages 561-62 states as a general rule the proposition that entering a contract is an act "preliminary" to doing business. In the same section, at footnote 76, Fletcher quotes at length an explanation of the reason for this rule by the Missouri Supreme Court:

> "Now, when our statutes say that a foreign corporation shall not 'transact business' here until it establishes a public office in this state, where books are kept and process may be served, and until it pays its quasi incorporation tax, and takes out its license, do they mean that the corporation must do all those acts before it can lawfully enter into a contract to do any business here? Does our law mean that, when advertisements inviting bids on public and private works in this state are read by foreign corporation, they are to understand that they have not the right to bid and have their bids accepted unless they shall have already complied with the terms of our statute to enable them to transact business here? No; that is not the meaning of our statutes. No such policy of exclusion has ever been shown in any of our legislative acts. Foreign corporations have always been invited and encouraged to come. The obtaining of a desirable contract is sometimes an inducement for a foreign corporation to come into the state. It is not bound to establish itself here before it can obtain such a contract. Entering into a contract like the one in question undoubtedly is 'transacting business', within the unlimited meaning of the term, but that is not the sense in which the term is used in the statute just quoted. As there used, it means carrying on the work for which the corporation was organized, and, in its application to the facts of this case, it means performing the work called for by the contract. The Kern Company, under the conditions stated in the petition, had the right to enter into the contract in question, and we hold it to be a legal and valid contract." **Hogan vs. St. Louis**, 176 Mo. 149, 75 S.W. 604. (At the time of **Hogan**, Missouri had a "no-cure" statute.)

The Restatement Second, Conflict of Laws, §311, also recognizes that a qualification rule which would discourage potential entry into the state should not be adopted. Section 311, Comment g, explains: "An agreement made in a state to do business there in the future does not amount to the doing of business [so to require qualification]."

This Court could, if it chose, separate the storage of the cotton after performance of Pittman's contract, from the activities at issue here. **Eli Lilly & Co. vs. Sav-on-Drugs, Inc.**, 366 U.S. 276, 282-83 (1961).

The activity of Allenberg which Pittman argues constitutes doing business in Mississippi is having title to cotton in a compress and warehouse between
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commerce interest must be considered in determining whether application of a state statute will be held unduly burdensome under the Commerce Clause. *Pike vs. Bruce Church*, 397 U.S. 137, 142 (1970); *Dean Milk Co. vs. Madison*, 340 U.S. 349, 354 (1951). Only six states have failed to provide curative provisions in no-suit penalties for failure to qualify. In this case Mississippi fails to allow cure despite good faith reliance on prior law and despite the fact that failure to qualify has neither prejudiced Pittman nor harmed the state. This harsh "no-cure" sanction is an alternative which the Court should hold is not available to the State.

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the time the documents are received in Tennessee and shipping orders are given. Even if this contention is accepted, the activity of Allenberg so far does not constitute doing intrastate business in Mississippi, and Mississippi's refusal to allow Allenberg to conduct its activity to date is an undue burden on interstate commerce.

It is widely recognized that merely bringing suit is not "doing business" so as to require qualification. **Fletcher, Cyclopedia of Corporations** §8471; Model Business Corp. Act, §99. Since neither entering into the instant contract nor bringing suit upon it is doing intrastate business in Mississippi, this Court should hold that Mississippi cannot require local qualification by Allenberg to conduct those activities; even if acts subsequent to these (such as having title to cotton in a warehouse before shipping orders are issued) may require qualification. Such a holding could be effectuated by reversing the decision below insofar as it denied Allenberg access to the courts of Mississippi, and remanding the case to Mississippi. If this Court concludes that obtaining performance of the contract would constitute "doing business" in Mississippi it could allow Mississippi to adopt a rule which would prohibit Allenberg from obtaining performance of the contract (or the equivalent of performance—obtaining a judgment) until it qualified to do business in Mississippi. Since Allenberg is now qualified to do business in Mississippi, under such a rule of law it would now be entitled to obtain judgment against Pittman, and the Mississippi Supreme Court should be instructed to enter judgment against Pittman in this case.

This is one manner in which the anti-competitive effect of the "no-cure" statute could be mitigated.

CONCLUSION

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the nation..." *H. P. Hood and Sons, Inc., vs. DuMond*, 336 U.S. 525, 539 (1949).

The Commerce Clause grants Allenberg free access to Mississippi markets to buy cotton there and ship it from the state. Under neither a mechanical analysis nor a balancing analysis is Allenberg required to qualify in Mississippi to purchase cotton there and ship it from the state. Imposition of qualification requirements in this case (whether rationalized by the state's hypothetical taxing interest, or otherwise), is in conflict with the principle that "our economic unit is the Nation," [336 U.S. 539] and the policy of free market access. The Federalist No. 11, at 52 (Cooke ed. 1961).

The agricultural merchandising system of our nation as it exists today is a realization of the goal of the founding fathers. The decision of the Mississippi Supreme Court in this case is a direct challenge to that goal.

For these reasons, the decision below should be reversed.

Respectfully submitted,

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